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8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE DISTRICT OF OREGON

10 TANYA DENDY,

Civil No. 08-352-AA
OPINION AND ORDER

11 Plaintiff,

12 vs.

13 MICHAEL J. ASTRUE,
Commissioner of Social Security,

14 Defendant.

15 _____
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AIKEN, Judge:

Claimant, Tanya Dendy, brings this action pursuant to the
Social Security Act (the Act), 42 U.S.C. §§ 405(g) and

1 1383(c)(3), to obtain judicial review of a final decision of the
2 Commissioner denying her application for disability insurance
3 benefits under Title II of the Act and for Supplemental Security
4 Income (SSI) disability benefits under Title XVI of the Act. For
5 the reasons set forth below, the Commissioner's decision is
6 reversed and remanded for additional administrative proceedings.

7 **PROCEDURAL BACKGROUND**

8 Plaintiff filed her applications for benefits on September
9 28, 2005. Tr. 15, 64. These applications were denied initially
10 and upon reconsideration. The plaintiff then requested a hearing
11 before an Administrative Law Judge (ALJ). On October 19, 2007,
12 after a hearing, the ALJ issued a decision finding plaintiff not
13 disabled. Tr. 12-22. Plaintiff timely requested Appeals Council
14 review of the ALJ's decision. On January 18, 2008, the Appeals
15 Council declined plaintiff's request for review. Tr. 6-8. The
16 ALJ's decision became the final order of the agency.

17 **STATEMENT OF THE FACTS**

18 Plaintiff was 32 years old at the time of the ALJ hearing.
19 She alleges she became disabled at age 28 in February 2004. Tr.
20 64. Plaintiff alleges disability based on a combination of
21 impairments: back and bilateral hip pain that causes difficulty
22 when standing, walking and sitting (can sit up to one hour at a
23 time); bilateral shoulder pain which causes difficulty lifting,
24 carrying, and reaching; depression with symptoms of isolating
25 herself because of difficulty being around people; and dizziness
26 or vertigo spells that occur 1-2 times per month and last for 15-
27 20 minutes at a time. Tr. 243-53.

STANDARD OF REVIEW

This court must affirm the Secretary's decision if it is based on proper legal standards and the findings are supported by substantial evidence in the record. Hammock v. Bowen, 879 F.2d 498, 501 (9th Cir. 1989). Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (quoting Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938)). The court must weigh "both the evidence that supports and detracts from the Secretary's conclusions." Martinez v. Heckler, 807 F.2d 771, 772 (9th Cir. 1986).

The initial burden of proof rests upon the claimant to establish disability. Howard v. Heckler, 782 F.2d 1484, 1486 (9th Cir. 1986). To meet this burden, plaintiff must demonstrate an "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected . . . to last for a continuous period of not less than 12 months. . . ." 42 U.S.C. § 423(d) (1) (A).

The Secretary has established a five-step sequential process for determining whether a person is disabled. Bowen v. Yuckert, 482 U.S. 137, 140 (1987); 20 C.F.R. §§ 404.1502, 416.920. First the Secretary determines whether a claimant is engaged in "substantial gainful activity." If so, the claimant is not disabled. Yuckert, 482 U.S. at 140; 20 C.F.R. §§ 404.1520(b), 416.920(b).

In step two the Secretary determines whether the claimant

1 has a "medically severe impairment or combination of
2 impairments." Yuckert, 482 U.S. at 140-41; see 20 C.F.R.
3 §§ 404.1520(c), 416.920(c). If not, the claimant is not
4 disabled.

5 In step three the Secretary determines whether the
6 impairment meets or equals "one of a number of listed impairments
7 that the Secretary acknowledges are so severe as to preclude
8 substantial gainful activity." Id.; see 20 C.F.R.
9 §§ 404.1520(d), 416.920(d). If so, the claimant is conclusively
10 presumed disabled; if not, the Secretary proceeds to step four.
11 Yuckert, 482 U.S. at 141.

12 In step four the Secretary determines whether the claimant
13 can still perform "past relevant work." 20 C.F.R.
14 §§ 404.1520(e), 416.920(e). If the claimant can work, she is not
15 disabled. If she cannot perform past relevant work, the burden
16 shifts to the Secretary. In step five, the Secretary must
17 establish that the claimant can perform other work. Yuckert, 482
18 U.S. at 141-42; see 20 C.F.R. §§ 404.1520(e) & (f), 416.920(e) &
19 (f). If the Secretary meets this burden and proves that the
20 claimant is able to perform other work which exists in the
21 national economy, she is not disabled. 20 C.F.R. §§ 404.1566,
22 416.966.

23 DISCUSSION

24 1. The ALJ's Findings

25 _____ At step one of the five-step sequential evaluation process
26 outlined above, despite earnings in excess of the monthly income
27 presumed to illustrate substantial gainful activity, the ALJ
28 found this activity to be an unsuccessful work attempt. Tr. 17;

1 20 C.F.R. §§ 404.157(c), 416.974(c). The ALJ also found based on
2 plaintiff's testimony at the hearing, that she was engaged in
3 substantial gainful activity following her return to work in July
4 2007. Tr. 17, 244-47; 20 C.F.R. §§ 404.1520(a), 416.920(b).
5 These findings are not in dispute.

6 At step two, the ALJ found that plaintiff suffered from the
7 following severe conditions: a back disorder, scoliosis, and a
8 left shoulder condition. Tr. 18. He also found that plaintiff had
9 non-severe mental symptomatology as she was sustaining full-time
10 work. Tr. 18; 20 C.F.R. §§ 404.1520(c), 416.920(c). This
11 finding is in dispute. The ALJ next determined that plaintiff
12 had the residual functional capacity (RFC): "to lift 20 pounds
13 occasionally and 10 pounds frequently; stand and walk 6 hours
14 each in an 8-hour workday; and sit 6 hours in an 8-hour workday.
15 The claimant is precluded from climbing of (sic) ladders, ropes,
16 and scaffolds. The claimant is limited to occasional reaching
17 above the shoulder level with her left upper extremity." Tr. 18-
18 20. This finding is in dispute.

19 At step four, the ALJ found that plaintiff could not
20 perform her past relevant work as a cashier/checker, waitress,
21 store laborer, and appointment clerk. Tr. 20-21. This finding
22 is not in dispute. Concluding the sequential evaluation process
23 at step five, based upon vocational expert testimony, the ALJ
24 found that plaintiff remained able to make an adjustment to other
25 work existing in significant numbers in the national economy.
26 Tr. 21-22. That work included: marking clerk, storage facility
27 clerk, and automatic developer of photographs - all unskilled
28 light work positions. Accordingly, the ALJ found plaintiff not

1 disabled from her alleged onset date of February 15, 2004,
2 through October 19, 2007, the date of the ALJ's decision. Tr.
3 15-22.

4 2. Plaintiff's Allegations of Error

5 The plaintiff alleges that the ALJ improperly rejected
6 plaintiff's testimony regarding depression and failed to develop
7 the record regarding plaintiff's depression.

8 Once the claimant establishes the existence of an
9 impairment and a causal relationship between the impairment and
10 some level of symptoms, the ALJ must provide clear and convincing
11 reasons, supported by substantial evidence to reject a claimant's
12 subjective claims. Carmickle v. Commissioner, 533 F.3d 1155,
13 1160 (9th Cir. 2008). The ALJ may consider many factors in
14 deciding a claimant's credibility including: "(1) ordinary
15 techniques of credibility evaluation, such as the claimant's
16 reputation for lying, prior inconsistent statements concerning
17 the symptoms, and other testimony by the claimant that appears
18 less than candid; (2) unexplained or inadequately explained
19 failure to seek treatment or to follow a prescribed course of
20 treatment; and (3) the claimant's daily activities." Tommasetti
21 v. Astrue, 533 F.3d 1035, 1039 (9th Cir. 2008) (internal citations
22 omitted).

23 Further, an ALJ may not reject claimant's testimony with
24 one 'general' statement. Instead, the ALJ must identify specific
25 evidence that demonstrates that specific testimony is not
26 credible. See Dodrill v. Shalala, 12 F.3d 915, 918 (9th Cir.
27 1993) (not sufficient for ALJ to make only general findings; he
28 must state which testimony is not credible and what evidence

1 suggests that particular testimony is not credible).

2 Plaintiff here argues that the ALJ "summarily and
3 arbitrarily" dismissed her testimony as well as the statements of
4 her husband regarding plaintiff's depression "without any
5 reason." The plaintiff points to her testimony to the ALJ that
6 depression caused her to isolate herself due to difficulty being
7 around people. Tr. 243-53. She further testified that due to
8 her depression, she was prescribed Paxil, and was unable to be
9 involved in normal family activities such as bike riding or
10 attending her children's school programs. Tr. 250. She also
11 stated in a Disability Report Appeal Form that her depression
12 began in October 2005, that she was "really depressed," and
13 "always sad and crying." Tr. 121. In a Function Report Form
14 plaintiff stated she had difficulty maintaining concentration,
15 spent little time with other people, had diminished memory, a
16 limited ability to complete tasks, and does nothing socially.
17 Tr. 114-15.

18 Plaintiff's husband, Allen Dendy, completed a Third Party
19 Function Report form. Tr. 102-09. Mr. Dendy indicated that
20 plaintiff did not go out of their home often, her ability to
21 handle money had changed since her disability began, and that
22 plaintiff had difficulty completing tasks and had trouble with
23 her memory. Tr. 102-07.

24 The ALJ relied on the Disability Determination Services'
25 (DDS) finding that plaintiff "had no history of counseling or
26 psychotropic treatment and there were no corroborating
27 symptomatology reported in the Third Party Function Report or her
28 Function Report. The ALJ further found that the claimant did not

1 allege an inability to sustain work at the competitive level due
2 to her mental symptomatology. . . ." Tr. 18. Plaintiff asserts
3 that not only are these findings "general," they are incorrect.
4 Plaintiff noted that she had disclosed that she was prescribed
5 and taking the anti-depressant Paxil, and that both plaintiff and
6 her husband described limitations relative to plaintiff's mental
7 impairment as described above. Tr. 102-09, 114-15, 121-27.
8 Plaintiff also counters the ALJ's statement that she "did not
9 allege an inability to sustain work at the competitive level due
10 to her mental symptomatology," when plaintiff specifically
11 explained at the hearing that she was having trouble performing
12 her job as a waitress due to her limited ability to be around
13 people. Specifically, plaintiff stated, "I have a hard time
14 [waitressing] because I'm around a lot of people and I don't like
15 being around a lot of people. I would rather be at home and be
16 in my bed than be around people." Tr. 251.

17 Plaintiff also points to her testimony regarding missed
18 work days. She testified that she misses on average 3 work days
19 per 2 month period, or approximately 1 ½ days per month. Tr.
20 243-53. That testimony is notable because the vocational expert
21 testified that a person would have difficulty maintaining a job
22 after several months of missing work on average one day per
23 month. Tr. 256-57.

24 I find that the ALJ made only general findings regarding
25 the plaintiff's and lay witness' testimony. The ALJ failed to
26 provide specific reasons supported by evidence for rejecting
27 plaintiff's and her husband's testimony regarding plaintiff's
28 depression and its impact on plaintiff. Therefore, this case is

1 reversed and remanded to the ALJ with instructions to reevaluate
2 this evidence on remand. Connett v. Barnhart, 340 F.3d 871, 876
3 (9th Cir. 2003).

4 **CONCLUSION**

5 The Commissioner's decision is not based on substantial
6 evidence. Because the ALJ failed to adequately address competent
7 lay witness testimony favorable to plaintiff and plaintiff's own
8 testimony, this case is reversed and remanded for further
9 proceedings as consistent with this Opinion.

10 IT IS SO ORDERED.

11 Dated this 14 day of April 2009.

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15 /s/ Ann Aiken

16 Ann Aiken
17 United States District Judge
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